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No. 71-1327

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH SCHWARTZ and BENJAMIN FRIEDLANDER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

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OPINION BELOW

The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1972. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including April 16, 1972, and on April 14,

1972, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court properly instructed the jury on reasonable doubt.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of having made false statements to a federal agency, in violation of 18 U.S.C. 1001 and 2, and of having used the mails to defraud, in violation of 18 U.S.C. 1341 and 2. Petitioners were fined $2,500 each pursuant to their conviction under 18 U.S.C. 1001. With respect to their conviction under 18 U.S.C. 1341, the court suspended sentence and placed them on two years' probation. The court of appeals affirmed without opinion.

Petitioners Schwartz and Friedlander were joint owners of the Schwartz Moving and Storage Company in New York City. Between December 1967 and May 1968, their company undertook to move a business known as Eskimo Yarns, Inc., to a site two and one-half blocks from its existing location (Tr. 182-190).[1] The move was carried out under Title I of the Urban Renewal Program. Pursuant to this program the moving company was to be paid by the City of New

[1] "Tr." refers to the transcript of the trial proceedings.

York on the basis of man-hours and truck-hours required to complete the move and the city was to be reimbursed by the federal Department of Housing and Urban Development. The moving company was required to submit daily bills of lading, daily tally sheets setting forth the work accomplished for the day and the number of man-hours and work-hours during that day and, at the conclusion of the move, an affidavit setting forth the work performed and the amounts charged (Tr. 95-103).

Richard Coyle, an employee of the Department of Relocation of the City of New York with responsibility for evaluating the cost of the job, testified at trial that the cost should have been $11,000.[2] The moving company submitted charges totalling $21,852 (Tr. 144-145). Coyle also said that when he visited the site to estimate the cost, the work being done appeared to be less than that represented on the daily bills submitted by the moving company (Tr. 104-107). Thereafter, two F.B.I. agents undertook surveillance of the moving operations and recorded the number of trucks and truck loads used during ten days of the thirty-three days required for the move. During the period January 2—January 22, 1968, the moving company submitted tally sheets and bills of lading which represented that the company delivered a total of nineteen truckloads from the old to the new site (Govt. Ex's 1A-10A, 14; Tr. 99, 103).

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[2] Coyle testified that his original estimate in 1967 was $15,997.10. Several months prior to trial he reevaluated the documents relating to the move and obtained the amount related at trial. (Tr. 144-145).

The surveillance records showed that during the same period seven truck loads were actually delivered, that a substantially fewer number of trucks were used than the talley sheets represented and that they had been used for substantially less time than that reported (Govt. Ex's 1-10; Tr. 19, 20-23, 52-55, 56-63, 70-73).

Petitioner Schwartz testified that he had visited the site on a few occasions to estimate the cost of the move. He submitted an estimate of $22,525, which he later revised to $21,700. He testified that during his few visits to the site, he relied upon the foreman, Stanley Fishman, who was appellant Friedlander's son-in-law (Tr. 261), for information concerning the progress of the move (Tr. 191-195, 210).[3] Petitioner Friedlander, who completed the bills of lading and tally sheets, also testified that he relied upon Fishman for information by which he completed the daily bills (Tr. 266-267). Friedlander stated that he was in charge of dispatching men and trucks and that he and Schwartz were aware of the number and location of trucks being used on the jobs of the moving company. (Tr. 266, 300-301).

ARGUMENT

1. Petitioners contend that the government failed to prove the falsity of representations contained in the bills of lading and tally sheets. The total charges submitted by the moving company were $21,852, or almost twice what the inspector for the city of New

[3] Fishman was not called to testify.

York had estimated (Tr. 144-145). Furthermore, surveillance by F.B.I. agents disclosed that representations of work performed on the daily bills of lading and tally sheets were substantially less than that actually completed, both in the number of trucks involved in the moving as well as the truckloads delivered (Govt. Ex's. 1-10, 1A-10A).

Petitioners also contend that the government failed to prove their knowledge of the falsity of the documents submitted. But the evidence showed that petitioners Schwartz and Friedlander, as owners of the moving company, were familiar with the operations of the firm including the number of men and trucks being used on the various jobs (Tr. 266, 300-301). Moreover, petitioner Friedlander stated at trial that he was in charge of dispatching men and trucks (Tr. 266), and prepared the payroll books designating the jobs on which the men were working (Tr. 306-307). The jury had a sufficient basis for finding guilty knowledge.

2. Petitioners further contend that the trial court improperly refused their requested instruction that "if two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the inference most favorable to the defendant" (Tr. 403; requested instruction is set out following Tr. 403a). Although the court refused the requested charge, it instructed the jury (Tr. 388-389):

> "The government having made the charge has the burden of proving it, and proving it beyond a reasonable doubt.

This burden never shifts. It remains with the government during the entire trial. A defendant does not have to prove his innocence. He is presumed to be innocent. This presumption is overcome only if you reach a conclusion from the evidence that his guilt has been established to your satisfaction beyond a reasonable doubt."

* * * *

"Now you may ask, what is meant by reasonable doubt?

There is nothing mysterious about this term. As the words themselves indicate, it means a doubt based on reason which arises from the evidence or from the lack of evidence. It does not mean a capricious doubt or a silly doubt or a doubt which might arise because of sympathy. It is such a doubt as would cause prudent men to hesitate before acting in matters of importance to themselves.

Proof in cases such as this is not a matter of mathematical certainty. In the nature of things, it cannot be, but to sustain a conviction there must be such evidence as satisfies your reason as intelligent human beings beyond a reasonable doubt that a defendant is guilty."

In view of the instructions actually given, petitioners were not prejudiced by the trial judge's refusal to give the charge they proposed. See *Mull* v. *United States*, 402 F. 2d 571, 575 (C.A. 9), certiorari denied, 393 U.S. 1107; *United States* v. *Kelinson*, 205 F. 2d 600, 602 (C.A. 2); see also *Holland* v. *United States*, 348 U.S. 121.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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